IN THE

Supreme Court of the United States

October Term, 1973

No. 73-947

VITO DeSALVO,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Petitioner Vito DeSalvo respectively prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered March 15, 1973 (petition for rehearing denied September 19, 1973), which affirmed his conviction for criminal contempt.

Opinions Below

The opinion of the Court of Appeals is reported at 32 N.Y.2d 12, 295 N.E.2d 753, 343 N.Y.S.2d 65, and is reproduced as Appendix A, pa A-1.* The order of the Court of Appeals denying a petition for rehearing and motion to amend the remittitur is reported at 33 N.Y.2d 657, 658; and

* We shall cite to the appendices filed with the petition as "pa", and to the appellant's appendix in the Court of Appeals (a copy of which is being lodged with the Clerk of this Court) as "a".

is reproduced as Appendix B, pa B-1. The opinion of the Supreme Court, Bronx County, is reported at 60 Misc. 2d 860, 304 N.Y.S.2d 310, and is reproduced as Appendix C, pa C-1. The order of the Supreme Court, Appellate Division, First Department, is reported at 36 App. Div. 2d 795, 319 N.Y.S. 2d 582, and is reproduced as Appendix D, pa D-1.

Jurisdiction

The judgment of the Court of Appeals was entered on March 15, 1973. A timely petition for rehearing and motion to amend the remittitur were denied on September 19, 1973. The jursidiction of this Court is invoked under 28 U.S.C. §1257(3).

Questions Presented

1. May a witness before a state grand jury (who has been granted transactional immunity under the applicable state statute) be compelled under threat of contempt to answer questions put to him which are concededly based upon an unconstitutional search and seizure of his person and effects?

2. If such witness has a Fourth Amendment right to refuse to answer grand jury questions based upon an unconstitutional search, is that right waived by a failure to assert it when the witness is first called before the grand jury, when the witness is unaware at that time of the unconstitutional basis of the questions?

Statement

On November 11, 1968 the Police Department of the City of New York conducted a raid of a restaurant and tavern in Bronx, New York, pursuant to a search warrant which described the premises, certain named individuals, and "any

other person" on the premises (a17-18). DeSalvo was not named in the warrant as a specific person to be searched; nevertheless, the police personally searched his person and his automobile, and as a result of the search seized various documents and items (pa D-2). DeSalvo was thereupon arrested and subpoenaed to appear before the November 1968 "B" Term Grand Jury in Bronx County, which was investigating gambling activities and possible violation of the State's usury laws (pa D-2).

Defendant appeared before the grand jury on March 7, 1969 and, after refusal to answer certain questions on the basis of possible self-incrimination, was granted immunity from prosecution under the New York immunity statute (then Section 619-C of the New York Code of Criminal Procedure; now C.P.L. § § 50.10, 50.20). He was again asked several questions, which he refused to answer "on the grounds it may tend to incriminate me" (pa D-2). Petitioner was then indicted on twenty-one counts of criminal contempt (a5, 18). On August 8, 1969 the contempt indictment was moved for trial before the Superme Court, Bronx County (a18).

After his appearance before the grand jury defendant was also indicted* for a number of crimes based upon the evidence seized during the search described above (a18). With the return of this second indictment, petitioner's counsel learned of the lack of DeSalvo's name in the warrant as a person to be searched and moved to dismiss the contempt indictment on the ground that the grand jury questions which petitioner refused to answer were based upon the unconstitutional search and seizure (a31). The motion to dismiss the indictment was argued before the Bronx County Supreme Court on August 19, 1969, at which time the Dis-

* This indictment was not the subject of DeSalvo's appeal to the Court of Appeals and is not now before this Court.

trict Attorney conceded for purposes of the motion that the search and seizure were unconstitutional as to DeSalvo and that but for the search and seizure DeSalvo would never have been called before the grand jury (a31; pa D-2). Mr. Justice Fraiman of the Supreme Court decided the merits of petitioner's "difficult and important" (pa D-3) constitutional claim, holding that the grant of immunity to him distinguished the case from *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385 (1920), and accordingly denied the motion. After a trial on stipulated facts before that court without a jury, petitioner was convicted on all twenty-one counts by judgment rendered November 21, 1970 (a14).

The conviction was affirmed without opinion by the Appellate Division of the Supreme Court, First Department, on March 4, 1971 (pa C-1). The Court of Appeals affirmed the conviction on March 15, 1973, without, however, deciding the question of whether a grand jury witness who had been granted immunity had a constitutional right to refuse to answer grand jury questions based upon an unconstitutional search of him. The Court of Appeals held instead that defendant waived whatever Fourth Amendment rights he may have had by failing specifically to assert them as the basis for refusal to answer when before the grand jury, despite the absence from the record of any finding or evidence that petitioner knew of the unconstitutional basis for the questions at that time. The Court of Appeals denied petitioner's motion for rehearing or an order amending the remittitur on September 19, 1973 (pa B-1).

Reasons for Granting the Writ

I

The substantive constitutional issue presented raises important questions concerning the scope of Fourth Amendment protection available to witnesses before State grand juries

This Court has recently considered the right of a witness before a grand jury to refuse to answer questions based upon illegally obtained evidence in cases quite similar to this one. In *Gelbard* v. *United States*, 408 U.S. 41 (1972), the Court held that a witness before a federal or state* grand jury may invoke 18 U.S.C. § 2515 as a *statutory* defense to contempt charges based upon refusal to answer grand jury questions resulting from illegal electronic surveillance. In *United States* v. *Calandra, No. 72-734, argued October 11, 1973*, the Court has before it the question whether a witness before a federal grand jury has a similar defense based solely on the Fourth Amendment, where the questions were based upon unconstitutional non-wiretap evidence. This case presents the same constitutional question as *Calandra* with respect to a witness before a state grand jury. This Court has held that the exclusionary rule at trial is binding upon the States under the process clause of the Fourteenth Amendment, *Mapp* v. *Ohio*, 367 U.S. 643 (1961); and the rationale of *Mapp* and related cases (e.g., *Elkins* v. *United States*, 364 U.S. 206 (1960)) supports application of a decision in *Calandra* to state grand jury proceedings as well.

* While *Gelbard* and its companion cases all involved witnesses before federal grand juries, 18 U.S.C. § 2515 prohibits use of tainted evidence before a "grand jury . . . of the United States, a State, or a political subdivision thereof. . . ."

Resolution of the constitutional issues in *Calandra* and in this case will determine the rights of many witnesses before grand juries, and will also affect the functioning of future grand juries. We respectfully submit that this Court should resolve the Fourth Amendment question presented in the context of a state as well as a federal proceeding.

Also of importance is the Government's urging in *Calandra* that *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920), the principal explication of the applicability of an individual's Fourth Amendment rights to grand jury proceedings, be overruled (Government reply memorandum, p. 5). The instant case will enable this issue to be fully briefed and argued to the Court.

II

The decision of the Court of Appeals on waiver of the witness's Constitutional right is in conflict with decisions of this Court

This Court has long held that a waiver of a fundamental constitutional right must be "an intentional relinquishment of a known right or privilege" (*Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)) and that the courts "do not presume acquiescence in the loss of fundamental constitutional rights" (*Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292, 307 (1937); *Johnson* v. *Zerbst*, *supra*). These principles have recently been unequivocally reaffirmed by this Court. See, e.g., *Schneckloth* v. *Bustamante*, 412 U.S. 218, 236-237 (May 29, 1973); *Fuentes* v. *Shevin*, 407 U.S. 67, 94 n.31 (1972); *D. H. Overmeyer Co. Inc.* v. *Frick Co.*, 405 U.S. 174, 185 (1972).

These principles, applicable also in civil cases, are particularly important in a criminal case, where an individual's liberty may depend upon the waiver. *D. H. Overmeyer Inc.* v. *Frick Co., supra.* In criminal cases, this

Court has applied the *Johnson* v. *Zerbst* standard to determination of the voluntariness of confessions (*Miranda* v. *Arizona*, 384 U.S. 436, 444 (1966)); the voluntariness of guilty pleas (*Brady* v. *United States*, 397 U.S. 742, 748 (1970); *Boykin* v. *Alabama*, 395 U.S. 238 (1969)); the right to counsel (*Carnley* v. *Cochran*, 369 U.S. 506, 512-513 (1962)); the right to a speedy trial (*Barker* v. *Wingo*, 407 U.S. 514 (1972)); the right to a jury trial (*Adams* v. *United States ex rel. McCann*, 317 U.S. 269 (1942)); and the right to confrontation (*Brookhart* v. *Janis*, 384 U.S. 1 (1966); *Barker* v. *Page*, 390 U.S. 719 (1968)).

The right of citizens to be free from unreasonable searches and seizures in their persons, houses, papers and effects is undeniably a fundamental constitutional right, no less important than those listed above, as this Court has held many times. This Court should make it clear that the state must be held to the same standard of proof when it alleges waiver of that right.

In contrast to the firm precedent established by this Court, the holding of the court below was made upon a record silent on the issue of waiver, in the face of a lower court determination of the substantive right at issue. Nothing in the record suggests that petitioner was aware of the unconstitutional search and seizure at the time he was called before the grand jury, or that he consciously refused to assert a Fourth Amendment claim at that time. The *per se* rule announced by Court of Appeals—that a Fourth Amendment claim be raised when a witness is first called before the grand jury or be forever waived—cannot be squared with decisions of this Court which hold that a waiver of a constitutional right cannot be inferred from a silent record (*Boykin* v. *Alabama*, *supra*; *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, *supra*); to the contrary, there is a heavy burden of proof on the State to show an

intentional relinquishment of a known right. *Schneckloth* v. *Bustamonte, supra.* The holding of the Court of Appeals is particularly inappropriate to waiver of a Fourth Amendment claim, since, unlike assertion of the privilege against self-incrimination (which is obviously applicable to each question), a witness may be unaware of a violation of his Fourth Amendment rights until some time after the violation has occurred. Courts have recognized this and have permitted a Fourth Amendment claim to be raised for the first time even on appeal. See, e.g., *People* v. *Morales,* 22 N.Y.2d 55 (1968), *vacated and remanded on other grounds sub nom. Morales* v. *New York,* 396 U.S. 102 (1969).

The holding of the Court of Appeals is bound to result in repeated assertions of frivolous Fourth Amendment claims by obstructionist grand jury witnesses. Faced with the alternative of waiver of Fourth Amendment rights, grand jury witnesses, especially those advised by counsel, will undoubtedly raise Fourth Amendment claims, well founded or otherwise, as a basis for refusal to answer questions, resulting in numerous disruptive hearings in open court to adjudicate those claims. Such proceedings are contrary to the effective functioning of the grand jury, see *Branzburg v. Hayes,* 408 U.S. 665 (1972), and *Gelbard* v. *United States,* 408 U.S. 41, 70 (1972) (White, J. concurring). This Court should avoid such interference by establishing appropriate procedural guidelines for the assertion of Fourth Amendment claims, consistent with the well established doctrine that waiver of a constitutional right is not lightly to be presumed.

Conclusion

The issues raised in this petition are important to the functioning of state grand juries and to the rights of witnesses called before them. We respectfully submit that the petition for a writ of certiorari be granted.

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December 1973

APPENDIX A

The PEOPLE of the State of New York, Respondent, v. Vito De SALVO, Appellant.

Court of Appeals of New York
March 15, 1973.

* * * * *

Richard G. Lyon and Paul Chevigny, New York City, for appellant. Mario Merola, Dist. Atty. (Daniel J. Sullivan, New York City, of counsel), for respondent.

BREITEL, Judge.

Defendant, convicted of criminal contempt (Penal Law § 215.50) for refusal to answer questions before a grand jury despite having been granted transactional and testimonial immunity, appeals. He contends that the grand jury proceeding was entirely illegal because, concededly, he would not have been subpoenaed as a witness before it except for an illegal search and seizure which revealed his availability as a witness and the relevancy of his testimony in a gambling investigation.

Following denial of defendant's motion to dismiss the indictment against him on the ground already noted, 60 Misc. 2d 860, 304 N.Y.S.2d 310, he was tried in Supreme Court without a jury and convicted on 21 counts and sentenced to imprisonment of three months and a fine of $500. The Appellate Division affirmed.

At no time while defendant was before the grand jury did he urge the illegality of the proceeding or of the antecedent search as a ground for refusing to testify, although he was given opportunities to and did consult with counsel. Instead, he asserted only his privilege against self incrimination. Because of his limited objection he was granted im-

munity in due course before the grand jury. Thus he waived any other ground he may have had for refusing to testify and such omitted ground may not now be availed of by way of defense to the prosecution for contempt. Consequently, the order of the Appellate Division should be affirmed.

In November, 1968, the police executed a warrant to search a restaurant in the Bronx in New York City and to apprehend and search certain individuals, not including De Salvo, for gambling records. The police found De Salvo in the restaurant, searched him and his automobile parked outside, uncovering a loaded revolver, wager slips, and eavesdropping devices. De Salvo contends that the search warrant and the ensuing search were ineffective and illegal as to him.

In March, 1969, De Salvo was called before a Bronx grand jury investigating gambling activities. De Salvo refused to answer any question on grounds of possible self incrimination. He consulted a lawyer, who was available to him from time to time during his grand jury appearance, and was then granted transactional and testimonial immunity pursuant to then Section 619-c of the Code of Criminal Procedure (now CPL 50.10, 50.20). De Salvo continued, however, to refuse to answer questions on the ground of self incrimination. At one point, he was again permitted to consult his lawyer. His refusals to answer are the gravamen for this prosecution.

On August 26, 1969, about five months later, De Salvo moved to dismiss the indictment on the ground that his appearance before the grand jury was prompted solely by an illegal search. For purposes of the motion, the People conceded that the search was illegal and that De Salvo would not have been called before the grand jury but for

the illegal search. The motion was denied on the ground that defendant had refused to testify solely because of possible self incrimination and that the grant of immunity precluded any challenge to the contempt charges based on an illegal search.

On this appeal De Salvo relies primarily on Gelbard v. United States, 408 U.S. 41, 92 S.Ct. 2357, 33 L.Ed.2d 179. It was there held that federal grand jury witnesses could invoke the illegality of an electronic eavesdropping as a defense to a contempt charge for refusal to testify on the ground of the illegality of the inquiry spurred by the illegal eavesdropping. That case, however, involved the application of the Omnibus Crime Control and Safe Streets Act of 1968 (U.S.Code, tit. 18. §§ 2510-2520, esp. § 2515) which prohibited use of illegal wiretaps before a grand jury. The court never reached the question whether the Fourth Amendment would shield a grand jury witness from a contempt charge for conduct before the grand jury (see concurring opn. by Mr. Justice Douglas, who would so hold [408 U.S., at p. 62, 92 S.Ct. 2357]). Moreover, in the *Gelbard* case, and this, it is suggested, is even more critical, the witnesses expressly refused to testify on the ground that the inquiry was based on illegal wiretaps and electronic surveillance (*id.*, at pp. 44-45, 92 S.Ct. 2357). In the instant case, on the contrary, the refusal to testify was never made on that ground.

In *Lanza* v. *New York,* 370 U.S. 139, 82 S.Ct. 1218, 8 L.Ed.2d 384, the court affirmed a conviction for contempt of a State legislative committee where the defendant had urged that the questions were based on illegally-intercepted conversations. The court, however, did not reach the issue whether a Grand Jury witness could be convicted for contempt for refusal to answer questions based on an illegal

search because it found that at least two of the questions were not the product of the illegally-intercepted conversations. Significantly, however, the court went on to state: "To hold that the petitioner could not constitutionally be convicted for refusing to answer such questions simply because they related to a conversation which had been unlawfully overheard by other state officials would thus be a completely unprecedented step." (370 U.S., at p. 145, 82 S.Ct., at p. 1222). Thus, if the cases are read together as they should be, it was the Omnibus Crime Control Act, and not the Fourth Amendment, that compelled the result in the *Geldard* case (cf. *Cali* v. *United States,* 464 F.2d 475 [1st Cir.], but see *United States* v. *Calandra,* 465 F.2d 1218, 1222-1226 [6th Cir.]).

Moreover, the exclusion of evidence derived from an illegal search or seizure has been confined to narrow limits. The right to exclusion must be asserted, and, of course, no benefit obtained, before asserting the right. Thus, in *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319, it was held that a corporation might not be convicted of contempt for refusal to comply with a subpoena to produce records, earlier seized by federal officials in an illegal search and then returned. In the *Silverthorne* case, unlike the present case, the right to exclusion was asserted by refusal to comply with the subpoena and no immunity or other benefit was previously obtained by asserting an entirely different objection to giving evidence.

Cases cited by De Salvo for the now settled proposition that evidence derived from a tainted or illegal source may be excluded both in federal and state proceedings are not relevant (e.g., *Mapp* v. *Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081; *Weeks* v. *United States,* 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, and cases in their wake in the Supreme Court). De Salvo did not refuse to testify on the ground that his appearance stemmed from an illegal search.

Had the prosecutor been aware of that objection, he might not have arranged for the granting of immunity to the witness. The proper procedure to be followed in challenging the propriety of grand jury questions was outlined or plainly implied in *People* v. *Ianniello,* 21 N.Y.2d 418, 424-426, 288 N.Y.S.2d 462, 467-469, 235 N.E.2d 439, 443-444, cert. den. 393 U.S. 827, 89 S.Ct. 90, 21 L.Ed.2d 98. There, the court stated that a witness should be permitted to consult his lawyer if he questions the extent of immunity conferred, the relevancy of the questions, or the existence of a testimonial privilege. If the witness then believes he is entitled to avoid testifying on a specific ground, he should refuse to answer and continue to assert his right, thereby forcing the prosecutor to take the issue into open court for a ruling (see, also, *United States* v. *Calandra,* 465 F.2d 1218, 1221, *supra* [6th Cir.], where such a procedure was followed). Here, De Salvo failed to assert the ground for his objection, belatedly asserted for the first time as a defense in this contempt prosecution. The prosecutor, therefore, may have been misled into arranging for the granting of immunity, and may have lost an opportunity for an immediate court determination of the availability of an illegal search as ground for a refusal to testify, and possibly of the legality of the search.

The distinctions are not merely technical. The obtaining of immunity, especially transactional immunity, may be a highly desired end. Such immunity could only be obtained by a claim of a privilege against self incrimination, with the prospect to the People, if immunity were granted, that useful testimony would follow. The granting of immuntiy would be a futility to the People if then the witness could assert the nullity of the questioning on some ground suppressed until immunity had been first obtained.

Having refused to answer on grounds of possible self incrimination and been granted immunity, De Salvo may not then challenge his subsequent contempt conviction on the ground that the search was illegal. It is not necessary, therefore, to reach the more difficult question whether, had De Salvo questioned the search at the outset, he could have been convicted of a contempt for a refusal to answer on the ground that the illegal search was the cause for him to be called as a witness.

Accordingly, the order of the Appellate Division should be affirmed.

FULD, C. J., and BURKE, JASEN, GABRIELLI, JONES and WACHTLER, JJ., concur.

Order affirmed.

APPENDIX B

Mo. # 632

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

vs.

VITO DESALVO,
Appellant.

Decision Court of Appeals September 19, 1973

Motion for reargument or amendment of the remittitur denied

APPENDIX C

Order of Affirmance on Appeal from Judgment

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on March 4, 1971.

Present—Hon. Louis J. Capozzoli, *Justice Presiding*
Owen McGivern
Arthur Markewich
Emilio Nunez
Theodore R. Kupferman, *Justices*

3317

The People of the State of New York,
Respondent,

against

Vito DeSalvo,
Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, Bronx County (Tierney, J.), rendered on November 21, 1969, convicting him after a non-jury trial of 21 counts of the crime of criminal contempt (Penal Law § 215.50), defendant-appellant also brings up for review an order of said Court (Fraiman, J.), entered on September 30, 1969, denying his motion to suppress evidence, and said appeal having been argued by Mr. Richard deCourcy Hinds of

counsel for the appellant, and by Mr. Daniel J. Sullivan of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from is, and the order brought up for review be, and the same are hereby, in all things, affirmed.

Enter:

Hyman W. Gamso
Clerk.

APPENDIX D

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiff, *v.* VITO DE SALVO, Defendant.
Supreme Court, Trial Term, Bronx County,
September 30, 1969.

Contempt—refusal to answer questions before Grand Jury —though Grand Jury subpoenaed man because of information derived from his unlawfully seized documents, Grand Jury granted him immunity from prosecution, and hence, for refusing to answer questions on ground of self incrimination, he was properly indicted for contempt.

A Grand Jury which was investigating gambling and usury subpoenaed a man and granted him full immunity from prosecution, but not for perjury or contempt in answering (Code Crim. Pro., § 619-e). Concededly, the subpoena was issued because of information derived from documents and items which had been unlawfully seized from him and from his automobile. He refused to answer questions before the Grand Jury, asserting that his answers might incriminate him. He was thereupon properly indicted for contempt. His motion to dismiss such indictment is denied.

Russo, Stein, Caiola & Victor for defendant. ***Burton B. Roberts, District Attorney*** (*Seymour Rotker* of counsel), for plaintiff.

ARNOLD G. FRAIMAN, J. The defendant was indicted on 21 counts of contempt for refusing to answer questions put to him by a Grand Jury, after having been granted immunity from prosecution. He now moves to have the indictment dismissed and for other sundry relief on the ground that the actions of the police which resulted in his appearance before the Grand Jury violated his constitutional rights. The facts

are not in dispute: As a result of an unlawful search by the police of the defendant's automobile and person, certain documents and items belonging to the defendant were unlawfully seized.[1] The defendant was thereafter subpoenaed to appear as a witness before the November 1968, "B" Term Grand Jury in Bronx County which was investigating whether the State penal laws pertaining to illegal gambling activity and usury had been violated by persons affiliated with elements of organized criminal activity. It is conceded by the District Attorney that the defendant would not have been summoned before the Grand Jury but for the documents and items which had been unconstitutionally seized.

The defendant duly appeared, and at the outset of the proceedings the Grand Jury, pursuant to section 619-c of the Code of Criminal Procedure, granted him immunity from prosecution with respect to any incriminating testimony he might give. Nevertheless, with respect to the 21 different questions set forth in the indictment, the defendant deliberately and repeatedly refused to answer, asserting in each instance that he did so "on the grounds that [the answer] may tend to incriminate me."

The defendant now moves to quash the indictment on the ground that he cannot be prosecuted for contempt for refusing to answer the questions posed by the Grand Jury because his very appearance before the Grand Jury resulted from, and would not have occurred but for, the unlawful search of his person and car. The People, on the other hand, contend that the so-called "poisoned fruits" doctrine is inapplicable, because the defendant was granted full and complete immunity from prosecution by the Grand Jury before he testified, and accordingly, his refusal to answer the posed questions was contemptuous.

1. This is conceded by the District Attorney solely for the purpose of this motion.

In the absence of any clear-cut authority on this difficult and important constitutional issue, a brief review of the landmark cases relating to the use of illegaly obtained evidence might be in order.

In 1914, in *Weeks* v. *United States* (232 U. S. 383) the defendant had been convicted in a Federal District Court of using the mails in violation of Federal law. During the trial, evidence obtained by a Federal Marshal as a result of an illegal search of the defendant's home was introduced and used against the defendant. The Supreme Court, in unanimously reversing the conviction, stated that the practice by prosecutors of obtaining convictions by means of unlawful seizures and enforced confessions "should find no sanction in the judgment of the courts" (p. 392), and held that the use of evidence obtained as a result of an illegal search and seizure in any Federal prosecution was precluded by the Fourth Amendment.

In *Wolf* v. *Colorado* (338 U. S. 25 [1949]), decided 35 years later, the court, while holding that the constitutional rights guaranteed by the Fourth Amendment were enforceable against the States through the Fourteenth Amendment, expressly declined to make applicable to the States the "exclusionary rule" established by the *Weeks* case. In this connection, the court said: "Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective" (p. 31).

Twelve years later, in *Mapp* v. *Ohio* (367 U. S. 643 [1961]), the court re-examined *Wolf* and flatly held that "all evidence obtained by searches and seizures in violation of the Constitution is • • • inadmissible in a state court" (p. 655). The court stated (p. 656): "In short, the admission of the new constitutional right by *Wolf* could not consist-

ently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused has been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment. Only last year the Court itself recognized that the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way —by removing the incentive to disregard it.' (*Elkins* v. *United States,* [364 U. S. 206], at 217.)"

Clearly, the principal issue in the *Mapp* case, as in the *Wolf* and *Weeks* cases before it, was the use of illegally obtained evidence in the prosecution of the person from whom the evidence was taken. Each case was a criminal case and in none did the court address itself to the question whether such evidence could be used in a civil proceeding or whether, as in the instant case, the evidence could be used in a criminal proceeding where the victim of the search had been granted immunity from prosecution. However, in *One 1958 Plymouth Sedan* v. *Pennsylvania* (380 U. S. 693 [1965]) the Supreme Court at least partially answered the former question. There the court considered whether the exclusionary rule set forth in the *Mapp* case applied to a forfeiture proceeding, which was at least nominally "civil" in nature, in a State court. The court concluded that it did.

In that case, an automobile owned and operated by one McGonigle was observed by law enforcement officers of the Pennsylvania Liquor Control Board as being "low in the rear, quite low". The officers stopped the car and proceeded to search it. They found 31 cases of untaxed liquor which they promptly seized, together with the car. McGonigle was arrested and charged with a violation of Pennsylvania law. In addition, the Commonwealth filed a petition for forfeiture of the car. McGonigle sought dismissal of the

petition on the ground that forfeiture of the automobile depended upon the admission of evidence unlawfully obtained. The trial court agreed and dismissed the petition. On appeal, the Supreme Court of Pennsylvania affirmed an intermediate appellate court's reversal of the dismissal on the sole ground that the *Weeks-Mapp* exclusionary rule only applied to criminal prosecutions and not to forfeiture proceedings, which the court deemed civil in nature. However, the United States Supreme Court reversed the determination of Pennsylvania's appellate courts and held that the exclusionary rule also applied to such proceedings. In so holding, the court relied heavily on *Boyd* v. *United States* (116 U. S. 616 [1886]) which also involved a forfeiture proceeding. It quoted from *Boyd* in part as follows: " 'We are also clearly of the opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal • • • If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants—that is, civil in form—can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be • • • As, therefore, suits for penalties and forfeitures incurred by the commission of offences against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution. • • •' " (*Plymouth,* pp. 697-698, quoting from *Boyd,* pp. 633-634.)

The court concluded that "the nature of a forfeiture proceeding • • • and the reasons which led the Court to hold that the exclusionary rule • • • is obligatory upon the States under the Fourteenth Amendment • • • support the conclu-

sion that the exclusionary rule is applicable to forfeiture proceedings such as the one involved here." (380 U. S. 702. See, also, *Matter of Finn's Liq. Shop* v. *State Liq. Auth.*, 24 N Y 2d 647 [1969].)

In 1962, the Supreme Court had before it the identical constitutional question presented in the instant case. (*Lanza* v. *New York*, 370 U. S. 139 [1962].) However, the court decided the case on other grounds, and did not squarely come to grips with the issue. Nevertheless, the court's opinion did give some indication, in dicta, of how it would have decided the question at that time, had it been necessary to do so. There, the defendant had been convicted in a State court of criminal contempt for refusing to answer a number of questions posed by a Joint Legislative Committee on Government Operations, after he had been granted immunity from prosecution. The subject of the Committee's investigation was possible corruption in the State parole system. Some time prior to the defendant's appearance before the Committee, officials of the Westchester County Jail had monitored and recorded a conversation between the defendant and his brother, Joseph "Socks" Lanza, who was then an inmate in that institution. The conversation, which was audited without the knowledge or consent of either party, took place in the visitors room of the jail. Six days later, Lanza was paroled by order of a Commissioner of the State Division of Parole. The circumstances surrounding his release prompted the legislative investigation.

On his appeal to the United States Supreme Court, the defendant argued that the monitoring of the conversation in the jail constituted an unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments; that he would not have been called before the Committee but for the overhead conversation; and that the exclusion-

ary rule rendered it impermissible for the Committee to use the unlawfully obtained transcript of his conversation in interrogating him.[2]

The court, with seven Justices participating in the decision, unanimously affirmed the conviction, on the ground that at least two of the questions which the defendant refused to answer were in no way related to the intercepted conversation, and on the further ground that it was probable that the defendant would have been called by the Committee even if the transcrips of his conversation with his brother had not existed. The court thus did not pass upon the constitutional issue raised by the defendant, but it did discuss it in its opinion, which was delivered by Mr. Justice STEWART for four of the Justices, the remaining three Justices concurring separately. After noting that it was "at best a novel argument" to say that a jail was a place where an individual could claim constitutional immunity from search and seizure, the court observed that, even assuming a jail were such a constitutionally protected place,

> "the petitioner's argument would still carry far beyond any decision which this Court has yet rendered. The case before us bears no resemblance to such cases as *Leyra* v. *Denno*, 347 U. S. 556, where a State attempted to use as evidence in a criminal trial a confession which had been elicited by trickery from the defendant while he was in jail. See, also, *Spano* v. *New York*, 360 U. S. 315. We do not have here the introduction in a state criminal trial of evidence which is claimed to have been unconstitutionally seized, as in *Mapp* v. *Ohio*, 367 U. S. 643. See *Rochin* v. *California*, 342 U. S. 165. Nor is this a case where it is claimed that the evidence actually offered at a trial

2. The defendant's conviction was affirmed, as modified, by the Appellate Division (10 A D 2d 315 [1st Dept., 1960]), and the Court of Appeals (9 N Y 2d 895 [1961]), but neither court discussed the constitutional issue.

> was procured through knowledge gained from what had been unlawfully obtained—the 'fruit of the poisonous tree.' Cf. *Nardone* v. *United States,* 308 U. S. 338.
>
> "Here no such evidence was ever introduced in a prosecution against the petitioner. Rather, the petitioner was convicted for willfully refusing to answer the pertinent questions of a duly constituted legislative committee in the conduct of an authorized legislative investigation, after having been given immunity from prosecution. To hold that the petitioner could not constitutionally be convicted for refusing to answer such questions simply because they related to a conversation which had been unlawfully overheard by other state officials would thus be a completely unprecedented step" (p. 145).

Thus, as of 1962, at least four Justices of the Supreme Court believed that the precise relief now sought by defendant in the instant case would represent a "completely unprecedented step."

That this would still be the position of the Supreme Court if the issue were presently before it is indicated by its opinion in a case decided just last year. (*Terry* v. *Ohio,* 392 U. S. 1 [1968].) In that case the court had occasion to review the constitutionality of the so-called "stop and frisk" procedure. After discussing the salutary purposes of the exclusionary rule, the court made the following observation: "The exclusionary rule has its limitations * * * as a tool of judicial control. It cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections. Moreover, in some contexts the rule is ineffective as a deterrent * * * Regardless of how effective the

rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal." (392 U. S. 13-14.)

From all of the foregoing, it is apparent that the exclusionary rule is not applicable to every invasion by the police of constitutionally guaranteed rights, but only to those instances where the evidence thus obtained, or the fruit thereof, is sought to be used against the victim of such an invasion in a criminal or quasi-criminal proceeding. In the instant case, no attempt was made to prosecute the defendant for any crime arising out of or connected with the items unlawfully seized from him. On the contrary, the grant of immunity extended to him by the Grand Jury encompassed all such crimes. His indictment arose not from any evidence unlafwully seized from him, but from separate and new offenses committed after he was granted immunity from prosecution for offenses committed prior thereto.

Defendant's reliance on *Silverthorne Lbr. Co.* v. *United States* (251 U. S. 385 [1920]) is misplaced. In that case, a Federal Grand Jury subpoenaed evidence which had theretofore been seized from the defandants in the course of an unlawful search, and subsequently returned to them. The defendants refused to comply with the subpoena, and were thereafter convicted of contempt. The Supreme Court, per Mr. Justice Holmes, reversed, stating in part: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all" (p. 392).

Thus, *Silverthorne* involved an attempt by a Grand Jury to compel the production of evidence which had originally

been unlawfully obtained for use against the victims of the unlawful seizure. No immunity from prosecution was extended in that case. When the court held that illegally obtained evidence could only not be used in court, but that "it shall not be used at all", it was obviously prohibiting its use indirectly, as well as directly, in the prosecution of the victim of the illegality. This is made clear from the context of the holding and from subsequent cases decided by the court. (See *Lanza* v. *New York, supra,* and *Terry* v. *Ohio, supra*). See, also, *People* v. *Harris* (25 N Y 2d 175 [1969]) where the New York Court of Appeals, just last July, reaffirmed its ruling in *People* v. *Kulis* (18 N Y 2d 318 [1966]) which held that statements obtained from a defendant in violation of the Fifth Amendment may be used by the prosecution to impeach the defendant's credibility if he takes the stand on the trial, even though such statements would be inadmissible on the People's case in chief.

Another recent decision by the Court of Appeals in a related context also supports the conclusion that the instant motion should be denied. In *People* v. *Tomasello* (21 N Y 2d 143 [1967] the defendant had been indicted for perjury allegedly committed before a Grand Jury investigating corruption in connection with certain public works projects in Suffolk County. The trial court had dismissed the indictment on the ground that Tomasello was a prime target of the investigation and therefore, could not be prosecuted for perjury, and the Appellate Division affirmed. On appeal to the Court of Appeals that court unanimously reversed the lower court's ruling.

The court restated the principle of law that when "a prospective defendant or a target of an investigation is called and examined before a grand jury, 'his constitutionally-conferred privilege against self incrimination is deemed violated' * * * and as a consequence of such violation

* * * 'the defendant is protected not only from indictment based on any incriminating testimony which he may have given, but also from use of such evidence'" (21 N Y 2d 148-49, quoting from *People* v. *Steuding*, 6 N Y 2d 214, 217). However, the court then went on to say that, "Since * * * the prospective defendant is automatically cloaked with an 'immunity' as broad as the constitutional privilege, fully protecting him from prosecution for substantive crimes on the strength of his testimony, such immunity * * * should 'not endow [him] with a license to commit perjury.'" (p. 149), and that the defendant properly could be convicted of perjury.

The analogy to the present case seems clear. Here, the defendant argues that calling him before the Grand Jury violated his constitutional rights, and consequently that he cannot be convicted of contempt for refusing to answer the Grand Jury's questions, even after being granted immunity. He is thus relying upon the precise rationale rejected by the Court of Appeals in the *Tomasello* case. Since he does not question the sufficiency or extent of the immunity conferred upon him, it follows that, as in the *Tomasello* case, the immunity grant not only did not "endow [him] with a license to commit perjury", but it also mandated that he answer the questions put to him or be indicted for contempt for his refusal to do so.[3]

Finally, it should be noted that in refusing to answer the Grand Jury's questions the defendant here did not rely on any violation of his Fourth Amendment rights. Instead, in each instance he expressly stated that he refused to answer "on the ground that it may tend to incriminate me." Since he does not now question or deny that complete immunity

3. The statute under which the defendant in the instant case was conferred immunity (Code Crim. Pro., § 619-c) specifically provides that the grant of immunity does not extend to perjury or contempt committed after such grant.

was granted him with respect to any testimony he might have given, it is apparent that his stated grounds for refusing to answer were completely unfounded. (*People* v. *Tomasello, supra.*)

For all of the foregoing reasons, the defendant's motion to dismiss the indictment is denied. The court makes no determination with respect to the other relief sought by the defendant in his motion papers, which relates to another indictment in which the defendant is named.

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-947

VITO DESALVO,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

This is a petition for a writ of *certiorari* to review an order of the Court of Appeals of the State of New York, entered March 15, 1973, unanimously affirming, with opinion [32 N.Y. 2d 12, 295 N.E. 2d 753, 343 N.Y. Supp. 2d 65; reproduced in petitioner's brief, Appendix A; decision denying motion to amend remittitur, 33 N.Y. 2d 657 (September 19, 1973), reproduced in petitioner's brief, Appendix B], and order of the Supreme Court of the State of New York, Appellate Division, First Department, entered

March 4, 1971, unanimously affirming, without opinion [36 A.D. 2d 795, 319 N.Y. Supp. 2d 582, reproduced in petitioner's brief, Appendix C], a judgment of the Supreme Court of the State of New York, County of Bronx, rendered on November 21, 1969, convicting him, after a non-jury trial before Tierney, J., of twenty-one counts of the crime of Criminal Contempt [N.Y. Penal Law, §215.50], and sentencing him to a term of three months in the New York City Correctional Institution For Men and a $500.00 fine upon one of the counts, with unconditional discharges being imposed upon the remaining counts. An unsuccessful pretrial suppression motion by the petitioner resulted in an opinion on the subject matter embraced in this petition [60 Misc. 2d 860, 304 N.Y. Supp. 2d 310; reproduced in petitioner's brief, Appendix D]. When judgment was pronounced upon him, De Salvo was freed on bail to await a final review of his constitutional claim.

Questions Presented

No viable issues remain in this case as a consequence of this Court's holding in *United States* v. *Calandra,* —— U.S. ——, 42 LW 4104 (January 8, 1974).

Statement of the Case

The early history of this case must be gleaned from papers on file in the trial court in connection with another indictment against the petitioner DeSalvo (No. 1069/69).

From those documents it appears that, on November 8, 1968, Justice Thomas Dickens of the Supreme Court of the

State of New York signed a search warrant authorizing the immediate search for gambling records and paraphernalia at the Eastchester Biltmore Gardens Restaurant, Inc., 3530 Eastchester Road, Bronx, and the immediate search of certain designated individuals, which list of names did not include the petitioner's. The warrant aforesaid was executed on November 11, 1968, somewhere around 3:00 p.m.

According to an affidavit by the petitioner's counsel, DeSalvo was in the bar identified in the last paragraph at the time of the search, with the result that his person was searched. Additionally, an automobile parked in a parking lot connected with the premises aforesaid, which vehicle was alleged to have been in the custody and control of DeSalvo, was searched. As a consequence of those actions, the police uncovered a loaded revolver, wager slips for sundry sporting events, and eavesdropping devices. On June 20, 1969, an indictment (No. 1991/69), charging DeSalvo with criminal possession of the items aforesaid, was filed in Supreme Court, Bronx County. By motion returnable September 23, 1969, the petitioner moved to suppress the items about which we have been writing, but that motion was referred to the trial court, where the possession case still remains.

Before the return of the indictment aforesaid, the petitioner was called as a witness by the November, 1968, "B" Term of the Bronx County Grand Jury. More specifically, that occurrence took place on March 7, 1969 (Grand Jury Min., p. 1b). At that time, DeSalvo gave his name and address in response to questions put to him by an assistant

district attorney (*ibid.*). Asked next what he did for a living, the petitioner DeSalvo replied, "I refuse to answer on the grounds that it may tend to incriminate me" (*ibid.*). Whereupon, the witness was excused from the grand jury room.

Upon his return, the petitioner was apprised that the Grand Jury had decided to immunize him in order to elicit his testimony (*ibid.*). The prosecutor went on to explain that the investigatory body was seeking to determine whether or not there had been a conspiracy in Bronx County to violate the gambling laws, and to determine whether or not organized crime elements, using moneys obtained from gambling and loan sharking activities, had infiltrated into legitimate business in the community aforesaid (*id.*, pp. 1b-2b). Thereafter, the prosecutor went on to explain that the immunity from prosecution did not extend to the crimes of perjury or contempt (*id.*, p. 2b).

In colloquy ensuing immediately thereafter, DeSalvo acknowledged that he had spoken to his attorney, Mr. Tobias Russo, who was outside the grand jury room, and that his counsel had advised him respecting his obligations (*ibid.*).

Subsequently, the pattern was that the petitioner would be asked a question which he refused to answer on the grounds that his response might tend to incriminate him (*id.*, pp. 2b-10b). Whereupon, he would be directed by the foreman to reply to the interrogatory, after which DeSalvo would again refuse to answer on the grounds of possible self-incrimination (*ibid.*). At a point during the examination, the petitioner was permitted, pursuant to his request,

to leave the chamber for purposes of again consulting with his counsel (*id.*, p. 7b). After taking that action, the petitioner DeSalvo continued to persist in invoking his privilege against self-incrimination (*id.*, pp. 7b-10b).

Because of the petitioner's contumacious conduct, an indictment (No. 1069/69), charging 21 counts of the crime of Criminal Contempt, was returned against him on April 7, 1969. Incidentally, the petitioner, as previously noted, was later indicted for the possessory crimes.

On August 19, 1966, the contempt case was moved to trial before the Hon. Arnold G. Fraiman (Min., 8/19/69, p. 2). At that time, Justice Fraiman and opposing counsel discussed the possibility that DeSalvo's Fourth Amendment rights had been violated when he was called before the grand jury as an outgrowth of the incident of November 11, 1968. In that connection, the prosecution conceded, for purposes of resolution of the instant problem, that the search which resulted in the petitioner's being brought before the grand jury had been an illegal one, and that, if it had not been for that search, DeSalvo would not have been summoned by that body (*id.*, p. 8).

Also noteworthy is the prosecutor's representation that all the questions asked of the petitioner before the grand jury had not pertained to the tangible items taken from the petitioner's person, but rather some were based upon information that had been learned about the petitioner Vito DeSalvo during independent investigation (*id.*, p. 3). Apropos of that subject, the record reflects that, in a memorandum of law addressed to this question, the prosecutor pointed out to the trial court that only 5 of the 21

questions asked DeSalvo had had anything to do with the seizure of property from his person and motor vehicle. In any event, the presiding jurist thought that observation irrelevant, at least when it was urged upon him in open court (*id.*, p. 4).

Apparently in accordance with Justice Fraiman's directive that formal papers should be filed, the petitioner, by motion returnable August 28, 1969, moved, pursuant to §§813(c) *et seq.* of the New York State Code of Criminal Procedure [now C.P.L., Article 710], for an order (1) declaring the November 11th search of the petitioner's person and automobile to have been illegal; (2) suppressing the tangible items that were uncovered during the search aforesaid; and (3) prohibiting the prosecution from using as evidence the questions posed to, and the answers given by, DeSalvo during the relevant grand jury proceeding on the grounds that the information and leads initiating those questions had been obtained as a consequence of an unlawful search of the petitioner's person and car.

In his prayer for relief, the petitioner requested the items just enumerated, and also that a further order dismissing the indictment be issued.

In a written opinion, Justice Fraiman denied the motion to dismiss the indictment, finding against De Salvo on the constitutional claim and also, implicitly at least, finding a failure by the petitioner to claim any conceivable constitutional protection in a timely fashion.

After the filing of the opinion just quoted, and more specifically on October 9, 1969, the case was again moved

for trial before the Hon. Charles G. Tierney (Min. 10/9/69, pp. 1-2). At that time, the petitioner waived his right to a trial by jury, and the trial was had upon an agreed statement of facts, with no witnesses actually testifying (*id.*, pp. 2-23). However, the defense noted that it took exception to the findings of Justice Fraiman (*id.*, p. 6). Also, the defense charged the prosecution with exploiting a "primary taint" of illegality by calling petitioner before the grand jury and by propounding questions to him which allegedly had been derived from the illegal search affecting the petitioner (*id.*, pp. 12-13). The stipulated record before Justice Tierney consisted of the transcript of the grand jury proceedings involving the petitioner and stipulations having to do with the regularity of those proceedings (*id.*, pp. 1-23). Essentially, the prosecutor's position on the pertinent issue was that the immunization of the petitioner in legal contemplation attenuated any "taint" of illegality stemming from the illegal search (*id.*, pp. 17-18). At the close of the proceedings just described, Justice Tierney reserved decision until the following day (*id.*, p. 20). On October 10, 1969, that jurist announced his decision finding the petitioner guilty of the 21 counts in the indictment (Min., 10/10/69, pp. 21-23). On November 21, 1969, the petitioner was sentenced to jail on one count, and unconditionally discharged as to the others (Min., 11/21/69, p. 7).

As we have seen, both New York's appellate tribunals have unanimously affirmed the conviction of the petitioner. As for that, the New York State Court of Appeals did not address the constitutional contention by DeSalvo, for the reason that it found that petitioner DeSalvo had failed to

raise that issue in a timely fashion. Accordingly, that tribunal later denied DeSalvo's motion to amend the remittitur so that it would reflect the fact that the Court in question had considered and passed upon the contention under the Constitution of the United States.

Argument

The petition herein was filed before this tribunal decided the case of *United States* v. *Calandra,* —— U.S. ——, 42 LW 4104 (January 8, 1974), and the petitioner urged that a review of the instant case would provide this Court with an opportunity to declare what effect its holding in *Calandra* would have upon the states. However, this Court, in *Calandra,* has now declared that a grand jury witness, such as the petitioner DeSalvo herein, has no constitutional right to invoke the exclusionary rule to bar questioning in these proceedings based on evidence obtained in an unlawful search and seizure. As a result, DeSalvo's plaint about deprivation of constitutional right would be unfounded even if he had properly raised and preserved the issue in the state courts.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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January, 1974